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No. 07-413

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DEMETRIS CRAWFORD,

Petitioner,

vs.

GREAT AMERICAN CASH ADVANCE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

REPLY BRIEF OF PETITIONER

CHARLES C. STEBBINS, III
WARLICK, TRITT, STEBBINS & HALL, LLP
699 Broad Street, Suite 1500
Augusta, Georgia 30901-1454
(706) 722-7543
Counsel of Record

GAIL DUFFIE STEBBINS
P.O. Box 204008
Martinez, Georgia 30917
(706) 738-7514

Attorneys for Petitioner

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ARGUMENT

Respondent contends at page 5 of its brief that the decision of the Georgia Court of Appeals rests on an adequate and independent state ground.[1] Respondent reads the concluding sentences of Division 2 of the Georgia court's opinion to say that, even if the FAA did not preempt state law forbidding pre-dispute arbitration clauses in small loan agreements such as Respondent's, nevertheless state law would uphold a pre-contractual agreement to opt out of such law. If the court had intended to hold that the parties could agree to nullify state law in the way, it would have had no need to address the federal preemption issue.

In the decision and the two Georgia cases it cites, the holding that the FAA preempts state law precedes, both textually and logically, the reference to the parties' choice of law. It is only because the court first cleared away the applicability of state law, on the basis of federal preemption, that it was free to enforce the contractual choice of law provision.

Georgia law, O.C.G.A. § 9-9-2(c)(5), explicitly excludes "any loan agreement or consumer financing

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[1] Respondent's discussion of unconscionability is irrelevant to the issue as to which the writ of certiorari is sought, which is whether the FAA should be required to be applied in state courts as a matter of federal law. The issue of unconscionability is not before this Court. This reply brief addresses only the adequate and independent state ground issue: all other issues mentioned by Respondent are either not pertinent to the federal preemption question or have been addressed in the petition.

agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution" from binding pre-dispute arbitrability. O.C.G.A. § 9-9-2(c)(5). This § 9-9-2 has been consistently construed to forbid enforcement of pre-dispute arbitration clauses in the excepted categories. *Dream Maker Construction, Inc. v. Murrell*, 268 Ga.App. 721, 603 S.E.2d 72 (2004); *Love v. Money Tree, Inc.*, 279 Ga. 476, 614 S.E.2d 47 (2005). The decision in the present case never mentions O.C.G.A. § 9-9-2. Another Georgia statute, O.C.G.A. § 13-8-2, forbids enforcement of contracts "against the policy of the law", which negates choice of law provisions *pro tanto*. See, *e.g.*, *Hostetler v. Answerthink, Inc.*, 267 Ga.App. 325, 599 S.E.2d 271 (2004). Had the court intended its reference to choice of law to be an independent and adequate ground of decision, it would have been required to consider whether O.C.G.A. § 9-9-2(c)(5) was an expression of public policy sufficient to negate the parties' choice of law.

Because Georgia, like most states, will enforce a choice of law provision only "in the absence of contrary public policy" (see *Scales v. Textron Financial Corporation,* 276 Ga.App. 903, 622 S.E.2d 903 (2005)), the failure of the court even to advert to public policy considerations shows that it considered that, as it had just held, the FAA preempts any such Georgia policies. That part of the court's opinion which refers to the contractual choice of law provision is completely dependent on the immediately prior determination that the FAA preempts all state law in

the area. That is why it is part of the same paragraph.

Under Respondent's theory of what the court has held state law to be, Georgia's law to protect small consumer borrowers from the consequences of ill-advised pre-dispute agreements to arbitrate can be completely eliminated, as a matter of state law only. The purpose of § 9-9-2(c)(5) is to prevent the lender from inserting a pre-dispute arbitration provision in a small loan contract. Respondent's position would mean the court has held that a lender can nullify this provision simply by including such nullification as one of the lenders' contractual demands, in the form of a choice of law provision.

The idea behind such a holding would essentially eviscerate all state law restricting the right of contract, no matter how compelling the state interest. No state restrictions on gambling contracts, for example, would be enforceable if some less restrictive state's law could be imported in this way. The Georgia Court of Appeals in this case would not have failed to address at least some of these concerns, had it intended that its reference to the intent of the parties would operate regardless of the federal preemption it had just discussed. The holding of the court is clearly that, since federal preemption sweeps away any need to examine Georgia law on the point, the intent of the parties is to be enforced.

When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven

with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Ohio v. Robinette*, 519 U.S. 33, 37 (1996), quoting *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). This case meets these criteria for federal jurisdiction. Further, to use another test employed in *Robinette*, whether the FAA preempts Georgia's protective law is surely a "predicate to an intelligent decision" of whether the choice of law clause can be enforced in this regard and so is "fairly included therein". 519 U.S. at 38. Simply put, it is not reasonable to believe that this case would have been decided as it was without the federal preemption established by *Southland Corp. v. Keating,* 465 U.S. 1 (1984).

CONCLUSION

In the case before this Court, Georgia's statutory policy of protecting consumers of small loans from pre-dispute agreements to arbitrate was abrogated by the court below solely because this Court's decision in *Southland Corp. v. Keating, supra,* requires that result. There is no independent and adequate state law basis for the state court's holding. For this very reason, the decision presents an ideal case in which to

reconsider this Court's erroneous and pernicious decision in *Southland*.

Respectfully submitted,

CHARLES C. STEBBINS, III
WARLICK, TRITT, STEBBINS & HALL, LLP
699 Broad Street, Suite 1500
Augusta, Georgia 30901-1454
(706) 722-7543
Counsel of Record

GAIL DUFFIE STEBBINS
P.O. Box 204008
Martinez, Georgia 30917
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Attorneys for Petitioner